No. 0111081

(1)

IN THE

SUPREME COURT OF THE UNITED STATES

TERRANCE DAVIS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TERRANCE DAVIS
(Your Name)

P.O. BOX 1000
(Address)

LEAVENWORTH, KANSAS 66048-1000
(City, State, Zip Code)

(N/A)
(Phone Number)

33 pp

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

TERRANCE DAVIS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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PETITION FOR WRIT OF CERTIORARI

TERRANCE DAVIS
(Your Name)

P.O. BOX 1000
(Address)

LEAVENWORTH, KANSAS 66048-1000
(City, State, Zip Code)

(N/A)
(Phone Number)

QUESTION(S) PRESENTED

I. IN A FEDERAL BANK ROBBERY CASE, DOES THE COURT'S SUBJECT - MATTER JURISDICTION DEPEND ON THE FEDERAL INSURED STATUS (F.D.I.C., §2113 (f)), OF SAID BANKS?

II. ARE STIPULATIONS TO ELEMENTS OF AN OFFENSE WHICH ESTABLISH FEDERAL JURISDICTION, LEGAL ACCORDING TO THE PRINCIPLES OF LAW SET FORTH BY THIS COURT?

III. DOES JURISDICTIONAL ELEMENTS OF AN OFFENSE HAVE TO BE SUBMITTED TO THE JURY IN A JURY TRIAL, FOR THE JURY TO DECIDE WHETHER OR NOT THE GOVERNMENT PRODUCED SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION?

IV. DOES THE FAILURE OF A TRIAL COURT TO INSTRUCT A JURY PROPERLY ON AN ESSENTIAL ELEMENT OF AN OFFENSE, CONSTITUTE VIOLATIONS OF AMENDMENTS FIVE (DUE PROCESS), AND SIX (RIGHT TO JURY TRIAL), OF THE UNITED STATES CONSTITUTION?

V. CAN A DEFENDANT CONFER SUBJECT - MATTER JURISDICTION ON A FEDERAL COURT, GIVING THE COURT THE POWER TO CONVICT THE DEFENDANT?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was DECEMBER 20, 2001.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: JANUARY 7, 2002, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, AMENDMENT 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONSTITUTION, AMENDMENT 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

Title 18 U.S.C. § 2113 (f):

As used in this section the term bank means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or banking institution organized or operating under the laws of the United States, and any bank of which the deposits are insured by the Federal Deposit Insurance Corporation.

Federal Rules of Civil Procedure, Rule 60 (b)(4):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgement, order, or proceeding for the following reason: (4) the judgement is void.

STATEMENT OF THE CASE

On March 8, 1994, the Federal Grand Jury returned an Indictment, charging Terrance Davis, with three counts of Armed Bank Robbery, and two counts for Firearms violations. Mr. Davis was arraigned on March 17, 1994, and entered a plea of Not Guilty.

Mr. Davis' Jury Trial commenced on July 11, 1994. The Jury returned a verdict of guilty, as to all five counts against mr. Davis, on July 15, 1994. On August 3, 1994, Mr. Davis' Attorney filed a Motion for Judgement of Acquittal or a New Trial. Judge Bartlett sentenced Mr. Davis to a consecutive term of 420 months imprisonment, on December 2, 1994.

Mr. Davis then Appealed, and his conviction was upheld on Direct Appeal. **United States v. Davis, 65 F.3d 172 (8th Cir. 1995)(unpublished table decision).** Mr. Davis then filed a Motion for relief, pursuant to, **Title 28 U.S.C. § 2255**, which was denied by the District Court, on February 25, 1999. **Davis v. United States, No. 97-0638-CV-W (W.D.Mo. 1999).** The Eighth Circuit dismissed Davis' appeal from the denial of his §2255 Motion. **Davis v. United States, 99-2407-W.D.Mo. (8th Cir. Nov. 12, 1999).** Mr. Davis then filed a Motion claiming that his judgement of conviction was entered without jurisdiction, which rendered the judgement **VOID**, pursuant to, **Fed. R. Civ. P., Rule 60 (b)(4)**, on December 4, 2000. On August 31, 2001, the District Court (Judge Howard F. Sachs), denied the Rule 60 (b)(4) Motion.

Then Mr. Davis filed a timely appeal. The Government subsequently filed a Motion, requesting to file a Motion to Dismiss Out Of Time, pursuant to, U.S. Court Of Appeals Eighth Circuit, Rule 47A, which the Eighth Circuit subsequently granted, as well as the Motion To Dismiss, on December 20, 2001. The petitioner then filed a timely petition for rehearing, which was denied on February 11, 2002.

The petitioner now files for Writ Of Certiorari.

REASONS FOR GRANTING THE PETITION

The petitioner in efforts and complete compliance with Rule 10, will show how the decisions were erroneous, and also the national importance of having the errors corrected by this Honorable Court.

First, the petitioner contends, that the lower court's decisions were erroneous, in that there is direct conflict with several of the sister Circuits, as well as legal precedent set forth by the United States Supreme Court.

The Trial Court committed errors of Constitutional magnitude, when the court allowed a conviction in the petitioner's case, in the absence of Federal Subject - Matter Jurisdiction, that jurisdiction being established by the Government proving the insured status, of the Banks alleged to have been robbed, pursuant to, **§2113 (f), (F.D.I.C.).**

Title 18 U.S.C. § 2113 (f), provides:

"As used in this section the term bank means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or banking institution organized or operating under the laws of the United States, and any bank of which the deposits are insured by the Federal Deposit Insurance Corporation."

FAILURE TO ESTABLISH SUBJECT MATTER JURISDICTION

The Government failed to prove, that the banks in question, conformed to the definition of a "Bank," as set forth in, **Title 18 U.S.C. § 2113 (f).**

However, what the Government did do in their efforts to prove the F.D.I.C. element, was have the petitioner to sign a stipulation to establish the jurisdiction of the Federal Court, over the instant case.

There are a number of different cases like this with very similar circumstances, of which the courts have ruled, that stipulating to jurisdictional elements is unacceptable and illegal, as established by legal precedent.

See: Pacific National Ins. Co. v. Transport Ins. Co., 341 F.2d 514, 516 (8th Cir.), "The parties...may not confer subject - matter jurisdiction upon the Federal Courts by stipulation, and lack of subject - matter jurisdiction cannot be waived by the parties, or ignored by the Court." See also: California v. LaRue, 409 US 109; Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 US 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982).

The Eighth Circuit, ruled in Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979), that the stipulation was the "functional equivalent" of a guilty plea, and could not be accepted unless the defendant understands the consequences of the admission.

Every Federal Court must determine the threshold question of subject - matter jurisdiction in every case. Bradley v. American Postal Worker's Union, AFL-CIO, 962 F.2d 800, 802 n.3 (8th Cir. 1992)(citing) Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 US 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982)(fed. ct. subject - matter jurisdiction cannot be waived, stipulated or consented to); Mitchell v. Maurer, 293 US 237, 79 L.Ed. 338, 55 S.Ct. 162 (1934).

The Assistant U.S. Attorney, and the Trial Judge both conceded to the fact that the F.D.I.C. element establishes subject - matter jurisdiction to have this case tried in Federal Court, when the Assistant U.S. Attorney stated, and I quote, "I think we need to be very careful with that, that it's clear on the record. That's the jurisdictional element for us being here, Judge."

The Trial Judge then stated, and I quote, "Yeah, that's right if you were trying this in law school somewhere and the professor was watching you. They said there's no dispute about it, why have the Jury burdened with it? It never was in dispute apparently. They don't even know it's an element." (See: Appendix E, at lines 17 thru 25, and Appendix F, at lines 1 thru 8).

The Assistant U.S. Attorney, and the Trial Judge violated the petitioner's Rights

to Due Process of Law, pursuant to the Fifth Amendmen Constitution, when the Government was allowed by the of proving the (F.D.I.C.), Jurisdictional element in the petitioner. Title 18 U.S.C. § 2113 (f).

The Eighth Circuit also stated in Cox, that the Tr inquiry, to assess the defendant's knowledge and volu the inquiry must be made a matter of record. Fed. R.

"As with a plea of guilty nothing remains but to g punishment." Boykin v. Alabama, 395 US 238, 89 S.Ct.

The petitioner entered a plea of NOT GUILTY, with and exercising all of his rights, guarenteed by the U United States v. Mays, 822 F.2d 793 (8th Cir. 1987), were federally insured is crucial to the establishmen to proving an essential element of the offense."). "F of proof as required to establish federal jurisdictio sustain a valid conviction under 18 U.S.C. § 2113 (a) of indictment." U.S. v. James, 987 F.2d 648 (9th Cir. 715 F.2d 260 (7th Cir, 1983).

"If one of the statutory requirements is not met, jurisdiction." Hurt v. Dow Chemical Co., 963 F.2d 114 also: United States v. Holloway, No. 99-10385 (1/5/01 17 F.3d 723 (5th Cir. 1994); United States v. Platenb United States v. Chapel, 41 F.3d 1338, 1340 (9th Cir.

The Assistant U.S. Attorney told the Trial Judge t jurisdiction for us being in federal court. The Judge to ensure that the Government met their burden of pro instant case, against the petitioner.

of the United States
urt to not carry their burden
ne instant case, to convict

al Court is required to make an
cariness of the admission, and
rim.P., Rule 11, 28 U.S.C.A.
ve judgement, and determine
709, 23 L.Ed.2d 274 (1969).
ne full intentions of retaining,
ited States Constitution. See:
nich states; ("Proof that the banks
of federal jurisdiction, and
llure to shoulder the burden
in a criminal proceeding to
and (d), requires dismissal
1993); United States v. Shively,

he District Court has NO
, 1145 (8th Cir. 1992). See
; United States v. Schultz,
rg, 657 F.2d 797 (5th Cir. 1981);
1994).
at the F.D.I.C. element established
conceded to the fact, but failed
ing the insured status in the

Specifically, Due Process required the Government to prove jurisdiction beyond a reasonable doubt, "every element of jurisdiction." If the Government fails to establish its burden of proof of every element of jurisdiction, the defendant must be acquitted. **In Re: Winship, 397 US 358 (1970); Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).**

The petitioner also claims that as a result of the element of jurisdiction not being established, this rendered the resulting judgement of conviction void. Thus the petitioner filed the motion for relief from such void judgement, pursuant to, **Federal Rules of Civil Procedure, Rule 60(b)(4).**

If a judgement is void, it is a nullity from the outset, and when rule providing relief from void judgement is applicable, relief is not a discretionary matter, it is mandatory. **Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994).**

The Court's duty to resolve the jurisdiction of the Court whether either party brings forth the motion. **[see: American Jurisprudence 2d. § 60, pg. 377].**

§ 60. POWER AND DUTY TO DETERMINE JURISICTION

"A COURT HAS THE POWER AND DUTY TO EXAMINE AND DETERMINE WHETHER IT HAD JURISDICTION OF A MATTER PRESENTED TO IT, THIS DETERMINATION BEING SUBJECT OF COURSE TO APPELLATE REVIEW. THIS QUESTION SHOULD BE CONSIDERED BY THE COURT BEFORE IT LOOKS AT OTHER MATTERS INVOLVED IN THE CASE, SUCH AS WHETHER THE PARTIES ARE ENTITLED TO A JURY TRIAL. IT MAY AND MUST DO THIS ON ITS OWN MOTION, WITHOUT WAITING FOR THE QUESTION OF ITS JURISDICTION TO BE RAISED BY ANY OF THE PARTIES INVOLVED IN THE PROCEEDINGS." (IN PART).

§ 62. JURISDICTION AS DEPENDENT ON APPLICATION FOR RELIEF

"THE GENERAL RULE IS THAT THE COURT CANNOT ADJUDICATE A CONTRAVERSY ON ITS OWN MOTION; IT CAN DO SO ONLY WHEN THE CONTRAVERSY IS PRESENTED TO IT BY A PARTY, AND ONLY IF THE CASE IS PRESENTED TO IT IN THE FORM OF A PROPER PLEADING. A COURT HAS NO POWER EITHER TO INVESTIGATE OR INITIATE PROCEEDINGS. WHEN A STATUTE PROSCRIBES A MODE OF ACQUIRING JURISDICTION, THAT MODE MUST BE FOLLOWED OR THE PROCEEDINGS AND THE RESULTING JUDGEMENT WILL BE VOID AND SUBJECT TO COLLATERAL ATTACK."

§ 65. EFFECT OF LACK OF JURISDICTION

"THE GENERAL RULE IS THAT PROCEEDINGS CONDUCTED OR DECISIONS MADE BY A COURT ARE LEGALLY VOID WHEN THERE IS AN ABSENCE OF JURISDICTION OVER THE SUBJECT MATTER.

A COURT CANNOT MAKE A DECISION IN FAVOR OF EITHER PARTY, CANNOT DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM, AND CANNOT RENDER SUMMARY JUDGEMENT, AS A DECISION WOULD BE ON THE MERITS OF THE ACTION. IT CAN ONLY DISMISS THE CASE FOR WANT OF JURISDICTION. HOWEVER, A COURT CAN SET ASIDE ORDERS IT MADE BEFORE THE WANT OF JURISDICTION WAS DISCOVERED, AND THE SUBJECT MATTER CAN BE SET ASIDE AND VACATED AT ANY TIME BY THE COURT THAT RENDERED IT." (IN PART).

Certain procedural or jurisdictional defects in obtaining a default judgement, render the judgement **"void"** within the meaning of **Fed. R. Civ. P., Rule 60(b)(4).** Unlike other basis for relief under **Rule 60(b),** "no time limit" exists to bring a motion to vacate void judgement. **Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Rules of Civil Procedure § 2862 (West 1995, 1996).**

The District Court tried to construe the 60(b) motion, as a second or successive § 2255 motion, to bind the petitioner to AEDPA time restrictions, and the constraints of 28 U.S.C. §§ 2244(b), and 2255.

Rule 60(b), is a distinct rule and procedure not governed by 28 U.S.C. §§ 2244(b), 2255, or the AEDPA. See: **Rodriguez v. Mitchell, 2nd Cir., No. 99-2170(L), (6/6/01).**

FAILU

The Trial Court instructed
Judge instructed the Jury in
and further advanced the misc
Attorney didn't meet his burd
offense. **(Title 18 U.S.C. § 2**

The law mandates that a cr
every element, of an offense,
S.Ct. 2310, 132 L.Ed.2d 444,
Duncan v. Louisiana, 391 US 1

"The Trial Judge is barred
independent judgement," **U.S.**
1349, 51 L.Ed.2d 642 (1977);
United States v. Whiteborse,
27 F.3d 199 (6th Cir. 1994);

The Sixth Amendment guaren
than judge reach requisite fi
allowed the Jury to decide ev
the statute. The petitioner b
Constitutional Rights, to Due
Right to Jury Trial, pursuant
evidenced in the Judge statin
"They," refers to the Jury. (

The 8th Circuit has ruled
"Judge committs plain error w
to conviction have conclusive

TO INSTRUCT THE JURY PROPERLY

the jury erroneously and improperly, when the Trial
nstruction no.15, which issued a mandatory presumption
rriage of justice, that began when the Assistant U.S.
n of proving the jurisdictional element of the charged
13 (f)).

minal defendant in a Jury Trial, be found guilty of
before a conviction can be rendered. U.S. v. Gaudin, 115
54 (1995); Apprendi v. New Jersey, 528 US 1018 (1999);
5, 151-154 (1968).

from attempting to override, or interfere with the Jury's
v. Martin Lenin Supply Co., 430 US 564, 572-73, 97 S.Ct.
nited States v. Voss, 787 F.2d 393 (8th Cir. 1986);
07 F.2d 1426 (8th Cir. 1986); United States v. Nelson,
nited States v. Johnson, 71 F.3d 139 (4th Cir. 1995).
ee, necessarily includes the right to have jury, rather
ding of guilty. The Trial Judge in the instant case never
ry essential element to constitute the violation of
lieves that the Judge intended to deprive petitioner his
Process, pursuant to, the Fifth Amendment, and also his
to, the Sixth Amendment of the U.S. Constitution. This is
, and I quote, "they don't even know its an element."
ee: Appendix F, at line no. 8).

n numerous cases, such as Voss and Whitehorse, that,
en he instructs as a matter of law, that facts essential
y been established by evidence, thus depriving the

Jury the opportunity to make that finding." (See: Appendix H, Jury Instruction No.15), which states:

"The Government and the defendant have stipulated — that is, they have agreed — that at the time of the three bank robberies, Boatman's Bank was then insured by the (F.D.I.C.) Federal Deposit Insurance Corporation. You should treat this as having been proved."

This had the effect of issuing a mandatory presumption to the Jury, and the recore clearly indicates that it was the Judge's intent to take the jurisdictional element away from the Jury to decide, when the Judge stated, and I quote, "When you argue instructions you can say, Remember, we read you an agreement, so this one is established, you don't need to worry about it." (See: Appendix G, at lines numbers 11 thru 13). This was referring to the jurisdictional element of the alleged offense.

There was absolutely no basis as to which the Jury could find that a bank in accordance with the statute had been robbed. The integrity of the Trial was impaired. See: Neder v. United States, 527 US 1, 10-11 (1999).

The court in United States v. Holloway, No. 99-10385, (1/5/01), stated that, "High authority again tells us that our discretion is not unfettered but "should" be exercised to reverse when "the integrity" of the trial has been impaired by the error." United States v. Olano, 507 US 725, 736 (1993).

Here, in the instant offense, the element of jurisdiction was not established by the Government, neither was it decided by the factfinders (being the Jury), and the integrity of the Jury Trial process was seriously impaired, rendering the resulting judgement of conviction VOID. The petitioner's conviction and imprisonment are illegal according to Federal Rules of Civil Procedure, Rule 60(b)(4), and Title 18 U.S.C. § 2113 (f).

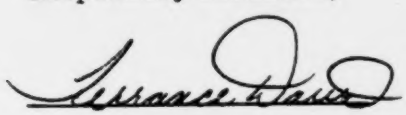
Therefore, knowing that this Honorable is interested in preserving Justice, and

seeing that Justice is served and protected, the petitioner prays that this Honorable Court issue the proper mandates in the interest of Justice. The petitioner also asks that this Court answer the questions presented in this petition, according to the principles of Law set forth by the U.S. Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: April 23, 2002

No. 0111031

IN THE

SUPREME COURT OF THE UNITED STATES

TERRANCE DAVIS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, TERRANCE DAVIS, do swear or declare that on this date, APRIL 23, 2002, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2002

Terrance Davis
(Signature)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 01-3353

Terrance Davis,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Western District of Missouri

JUDGMENT

The United States is granted leave to file its motion to dismiss out of time.

The court has carefully reviewed appellant's brief and the original file of the district court. Appellee's motion to dismiss the appeal is granted, and the appeal is dismissed.

(5361-010199)

December 20, 2001

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix A

U ED STATES COURT OF A. _ALS

FOR THE EIGHTH CIRCUIT

No. 01-3353

Terrance Davis,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	Western District of Missouri
United States of America,	*	
	*	
Appellee.	*	

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

(5193-010199)

February 11, 2002

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix B

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TERRANCE DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 94-00032-01-CR-W-6
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the court are defendant's motion for leave to file a motion pursuant to Federal Rule of Civil Procedure 60(b)(4), defendant's motion for relief from judgment pursuant to Rule 60(b)(4), and defendant's motion for leave to proceed in forma pauperis. The judgment from which defendant seeks relief is his judgment of conviction dated December 7, 1994.

Davis was convicted of armed bank robbery and using a firearm during a crime of violence and sentenced to thirty-five years imprisonment. His conviction was upheld on direct appeal. United States v. Davis, 65 F.3d 172 (8th Cir. 1995) (unpublished table decision). Davis then filed a motion for relief pursuant to 28 U.S.C. § 2255, which was denied by the district court on February 25, 1999. Davis v. United States, No. 97-0638-CV-W (W.D. Mo. 1999). The Eighth Circuit dismissed Davis's appeal from the denial of his section 2255 motion. Davis v. United States, No. 99-2407-WDMO (8th Cir. Nov. 12, 1999). Davis now brings the present motions in the underlying criminal case, arguing that the judgment of conviction was entered without jurisdiction because the government failed to offer proof of the federally insured status of the banks that were robbed.

Exhibit B

COPY

Appendix C

DOCUMENT 113

On July 21, 1999, Davis filed an almost identical motion seeking to reverse and dismiss his convictions for lack of subject matter jurisdiction. Although citing different legal authority, Davis's current claims regarding the validity of his judgment are essentially the same claims raised in the previous motion. He now argues that the judgment should be set aside because it is void because the court lacked subject matter jurisdiction because the government failed to prove the federally insured status of the banks that were robbed. It is clear from the record that Davis stipulated to the fact that the banks were federally insured. The court denied the previous motion challenging federal subject matter jurisdiction, finding that it was frivolous.

The claims raised by Davis in the present Rule 60(b) motion are in the nature of post-conviction relief and are of the type that could be brought in a proceeding pursuant to 28 U.S.C. § 2255. See Guinan v. Delo, 5 F.3d 313, 316 (8th Cir. 1993); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992). His current claims were available to him on direct appeal and in the course of his first section 2255 motion as they are based on purported errors based on the proof presented at trial and not on new evidence or changed circumstances that would support his argument that the judgment of conviction is void. The court thus construes Davis's motion as a successive motion for relief from judgment pursuant to 28 U.S.C. § 2255. This court has no authority to hear a second or successive section 2255 motion for post-conviction relief without an appropriate certification from the court of appeals. 28 U.S.C. §§ 2244(b) and 2255; Rodgers v. United States, 229 F.3d 704, 705-06 (8th Cir. 2000). As Davis's motion is not properly before this court, it will be denied.[1] Accordingly, it is hereby

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[1]This motion should properly be denied under Rule 60(b) also as it was not brought "within a reasonable time" after entry of the judgment. Fed. R. Civ. P. 60(b).

ORDERED that defendant's motion to for leave to file a motion pursuant to Federal Rule of Civil Procedure 60(b) (doc. 108) is DENIED as moot. It is further

ORDERED that defendant's motion for relief from judgment or order, which the court construes as a motion for post conviction relief pursuant to 28 U.S.C. § 2255, (doc. 109) is DENIED. It is further

ORDERED that defendant's motion for leave to proceed in forma pauperis (doc. 110) is DENIED as moot.

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

August 31, 2001

Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 94-00032-01-CR-W-9
	)	
TERRANCE DAVIS,	)	
	)	
Defendant.	)	

CLERK U.S.DISTRICT COURT
Exhibits: P 15 D
Case No. 94-00032-01-CR-W-9

STIPULATION CONCERNING THE AMOUNT OF LOSS
AND FDIC COVERAGE FOR THE BOATMEN'S BANK
ROBBERIES CHARGED IN THE INDICTMENT

COME NOW the parties, the United States of America, by and through its undersigned counsel, and the defendant, Terrance Davis, in person and by his counsel, Frank Smith III, and hereby agree and stipulate as follows:

1. That the amount of the bank's loss, in conjunction with the robbery of Boatmen's Bank, 115 W. 63rd St., Kansas City, Missouri, which occurred on February 16, 1994, was approximately $286.00 (Count Four of the Indictment).

2. That the amount of the bank's loss, in conjunction with the robbery of Boatmen's Bank, 115 W. 63rd St., Kansas City, Missouri, which occurred on January 28, 1994, was approximately $4,072.00 (Count Two of the Indictment).

3. That the amount of the bank's loss, in conjunction with the robbery of Boatmen's Bank, 8550 Holmes, Kansas City, Missouri, which occurred on December 17, 1993, was approximately $2,898.00 (Count One of the Indictment).

4. That at the time of each of the aforementioned robberies, the amounts set forth herein represented money

Exhibit D

belonging to and in the care, custody, control, management and possession of Boatmen's Bank, an institution whose deposits were then insured by the Federal Deposit Insurance Corporation (FDIC).

The parties agree that this stipulation shall be read to the jury and entered into evidence as Exhibit #15 during the Government's case-in-chief.

STEPHEN L. HILL, JR.
United States Attorney

By

7-6-94
DATE

DAVID DeTar NEWBERT #33588
Assistant United States Attorney

7-6-94
DATE

TERRANCE DAVIS
Defendant

7-6-94
DATE

FRANK SMITH III
Counsel for Defendant

anybody has to offer that apply to all of the different charges before we get into the first package of instructions pertaining to the first charge?

Apparently not. The next one then will be numbered 14.

MR. SMITH: If I might, Your Honor, the last one is 14, "You have heard testimony from Troy Taylor"?

THE COURT: Yes.

So the packaging instruction for this group of instructions pertaining to the charge of bank robbery by use of a dangerous weapon on December 17, 1993 will be No. 15. We'll fill in the blanks here in a minute. Let's set that aside.

The next one is the elements of the offense for the crime of bank robbery by the use of a dangerous weapon on December 17, 1993.

MR. DeTAR NEWBERT: Your Honor, we have an instruction pertaining to the FDIC element that we'd like to offer.

MR. SMITH: Judge, a copy of that instruction has been provided to the defendant and we do not object.

THE COURT: Well, why do we need that? There's no dispute, nobody is taking the position that being insured by the FDIC is in dispute.

MR. DeTAR NEWBERT: I think we need to be very

careful with that, that it's very clear on the record. That's the jurisdictional element for us being here, Judge.

THE COURT: Yeah, that's right if you were trying this in law school somewhere and the professor was watching you. They said there's no dispute about it, why have the jury burdened with it? It never was in dispute apparently. They don't even know it's an element.

MR. DeTAR NEWBERT: I said in my opening statement --

THE COURT: You asserted it. It wasn't an issue until then so I don't -- but I'll do it. It's just the kind of thing that makes instructions difficult for juries to understand. They're told stuff they don't need to know. Communicating with juries is something more than talking to appellate courts. All you need to do with the jury is present to them what they have to decide.

And I'm against presenting things to juries that they don't have to decide. In other words, you burden it with stuff that's -- sure it's jurisdictional. If there was a dispute about it, you're exactly right. If anybody said, "I want to have it proved," then the jury has to decide whether the Government has proved beyond a reasonable doubt that the bank was insured by

from the presence of Boatmen's Bank approximately $2,898.00"?

MR. DeTAR NEWBERT: Was in possession of Boatmen's Bank and there's a stipulation that was read to the jury that said there is no dispute of the amounts of loss for each of the three bank robberies and at the time of the loss the monies were in the care, custody and control.

THE COURT: But who cares if it's not in dispute? Nobody is going to argue to the jury that it's in dispute. When you argue instructions you can say, "Remember, we read you an agreement, so this one is established, you don't need to worry about it." We don't need to give them another instruction which complicates it. It uses different language than the instruction uses. It uses "in the care, custody and control," doesn't mentioned the word "possession."

Therefore, you have inserted the kind of thing that hangs up juries who are paying attention and the juries in this district get hung up on stuff like this. So the instruction time is not the time to unload all the stuff that some law professor might say ought to be in here.

This is to be presented to the jury in language which we can understand and hopefully they can

INSTRUCTION NO. 15

The Government and the defendant have stipulated--that is, they have agreed--that at the time of the three bank robberies, Boatmen's Bank was insured by the Federal Deposit Insurance Corporation (FDIC). You should therefore treat this as having been proved.

Supreme Court, U.S.
FILED
OCT 25 2002
CLERK

No. 01-11031

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

RECEIVED
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SUPREME COURT, U.S.

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QUESTION PRESENTED

Whether petitioner's motion under Federal Rule of Civil Procedure 60(b) filed in 2000 to overturn his 1994 convictions was correctly recharacterized as a second or successive motion under 28 U.S.C. 2255.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-11031

TERRENCE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001. A petition for rehearing was denied on February 11, 2002. The petition for a writ of certiorari was filed on April 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Gov't C.A. Br. 1, United States v. Davis (8th Cir. No. 94-3970WM) ("Gov't C.A. Br."). He was sentenced to 420 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. United States v. Davis, 65 F.3d 172 (8th Cir. 1995) (Table).

Petitioner's motion for relief under 28 U.S.C. 2255 was denied by the district court, and the court of appeals denied petitioner's application for a certificate of appealability. Judgment dated 9/8/99, Davis v. United States (8th Cir. No. 99-2407WMKC). Petitioner then filed a motion to dismiss his convictions for lack of subject matter jurisdiction, which the district court denied. In November 2000, petitioner filed a motion under Federal Rule of Civil Procedure 60(b)(4) for relief from his judgment of conviction. The district court denied the motion, Pet. App. C, and the court of appeals dismissed petitioner's appeal. Pet. App. A.

1. Between December 17, 1993, and February 16, 1994, petitioner participated in three armed bank robberies of the Boatmen's Bank in Kansas City, Missouri. During the second and third robberies, both petitioner and his co-conspirator Troy Taylor

displayed guns. During the third robbery, the robbers took a customer hostage and exchanged gun fire with a security guard. The robbers crashed their car during the attempted getaway and fled on foot. A short time later, police captured two of petitioner's co-conspirators, who identified petitioner as the third robber. That same day, petitioner called his cousin, from whom he had borrowed the getaway car, and told him to report it stolen. Petitioner's cousin learned that his car had been used in the robbery when he recognized it on the evening news. Gov't C.A. Br. 2-7; Presentence Report (PSR) at 5-7.

2. During trial, petitioner and his counsel signed a stipulation acknowledging that the Boatmen's Bank was "an institution whose deposits were then insured by the Federal Deposit Insurance Corporation (FDIC)." Pet. App. D at 2. The court's instructions reminded the jury of that stipulation and stated that "[y]ou should therefore treat this as having been proved." Pet. App. H. On direct appeal, petitioner did not raise any issue relating to this stipulation or instruction. Gov't C.A. Br. 8-11; United States v. Davis, 65 F.3d 172 (8th Cir. 1995) (Table).

3. In 1997, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. He claimed, among other things, that his counsel was ineffective when he convinced petitioner to stipulate that the Boatmen's Bank was insured by the FDIC because the stipulation removed a possible basis for the jury to find him not

guilty. Order Denying Petitioner's Motion for Relief Pursuant to 28 U.S.C. § 2255 at 3 (Davis v. United States, No. 97-0638-CV-W (W.D. Mo. 1999)). On February 25, 1999, the district court denied that motion, finding that defense counsel's conduct was not unprofessional because "[w]ithout a factual basis for arguing that the bank was not insured by the FDIC, the decision to stipulate that the bank was insured by the FDIC was not unreasonable." Ibid. The district court denied petitioner's request for a Certificate of Appealability and the court of appeals dismissed petitioner's appeal. Judgment dated 9/8/99, Davis v. United States (8th Cir. No. 99-2407WMKC).

4. On July 21, 1999, petitioner filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, which the district court denied as "frivolous." Order dated 1/16/00 Denying Defendant's Motion to Reverse and Dismiss Convictions For Lack of Subject Matter Jurisdiction at 1 (United States v. Davis, No. 94-00032-CR-W-9).

5. On November 11, 2000, petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(4) contending that his 1994 convictions should be overturned because the government failed to prove that the Boatman's Bank was insured by the FDIC. Petitioner argued that the government was required to introduce evidence to prove that fact because subject matter jurisdiction cannot be conferred upon the court by stipulation. In addition,

petitioner argued that the trial court's instructions precluded the jury from deciding the jurisdictional element of the case and therefore deprived him of his Sixth Amendment right to a jury trial.

On August 31, 2001, the district court denied petitioner's motion. Pet. App. C. The court found that petitioner's claims were "in the nature of post-conviction relief and are of a type that could be brought in a proceeding pursuant to 28 U.S.C. § 2255." Id. at 2. Accordingly, the court "construe[d] Davis's motion as a successive motion for relief from judgment pursuant to 28 U.S.C. § 2255." Because petitioner had not obtained a certification from the court of appeals allowing him to file such a motion, see 28 U.S.C. 2244(b) and 2255, the court concluded that petitioner's motion should be denied. Ibid. In a footnote, the court noted that "[t]his motion should properly be denied under Rule 60(b) also as it was not brought 'within a reasonable time' after entry of judgment. Fed. R. Civ. P. 60(b)." Id. at 2 n.1.

6. Petitioner filed an appeal, which the government moved to dismiss on the grounds that petitioner had failed to obtain a certificate of appealability and that his action was frivolous. Motion to Dismiss filed 10/30/01 at 3-5, Davis v. United States (8th Cir. No. 01-3553). By judgment dated December 20, 2001, the court of appeals indicated that it had "carefully reviewed appellant's brief and the original file of the district court" and

that petitioner's appeal was dismissed. Pet. App. A.

ARGUMENT

Petitioner contends (Pet. 9) that the district court erred in construing his motion as a second or successive motion under 28 U.S.C. 2255, arguing that "Rule 60(b) is a distinct rule and procedure not governed by 28 U.S.C. §§ 2244(b), 2255, or the AEDPA." Pet. 9. That claim lacks merit and does not warrant further review.

1. Under 28 U.S.C. 2255, a second or successive motion for collateral relief cannot be filed unless the court of appeals certifies that it relies either on newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.[1] Petitioner does not claim that he was entitled to file such a second or successive motion in this case. Instead, he claims that his motion is properly construed as a motion to reopen his 1994 convictions pursuant to

---

[1] Specifically, in order to file a second or successive motion under Section 2255, a prisoner must first receive certification from a court of appeals that the motion relies on:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2255, ¶ 8.

Federal Rule of Civil Procedure 60(b). That claim is without merit.

a. As an initial matter, review is unwarranted because petitioner would not be entitled to relief even if, as he requests, his motion were treated as having been brought under Rule 60(b). Rule 60(b) authorizes a court to relieve a party from an adverse judgment for mistake or inadvertence, newly discovered evidence, fraud or other misconduct, a void judgment, satisfaction of the judgment, or any other reason justifying relief. Petitioner's underlying claims -- that parties can not stipulate to jurisdictional facts and that the district court misinstructed the jury on his bank robbery offenses -- are challenges to his criminal convictions. See Pet. App. C at 1 ("The judgment from which defendant seeks relief is his judgment of conviction dated December 7, 1994."). Rule 60(b), however, is a civil rule, and does not provide for relief from a judgment in a criminal case. United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998) (per curiam); United States v. O'Keefe, 169 F.3d 281, 289 (5th Cir. 1999) (Dennis, J., dissenting from grant of stay pending appeal); United States v. Brown, No. 96-79, 2000 WL 375235 (E.D. La. April 11, 2000) (collecting cases); see Fed. R. Civ. P. 1 ("[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature").

Furthermore, petitioner failed to raise these claims on direct

review of his conviction. Ordinarily, where a claim could have been decided on direct review, that claim cannot be relitigated pursuant to Rule 60(b). Bell v. Eastman Kodak Co., 214 F.3d 798, 800-801 (7th Cir. 2000) (claims that could have been raised on direct appeal -- including a claim that the district court lacked subject matter jurisdiction -- are not cognizable under Rule 60(b)); see 11 Wright, Miller & Kane, Federal Practice and Procedure, § 2862 at 331 (1995).

A Rule 60(b) motion must be filed "within a reasonable time" after the judgment, or within one year if the grounds are mistake or inadvertence, newly discovered evidence, or fraud. Petitioner's motion was filed in 2000, almost six years after he was sentenced by the district court. As the district court concluded, his motion was untimely. See Rodriguez v. Mitchell, 252 F.3d 191, 201 (2d Cir. 2001) (Rule 60(b) motion denied because three and one-half year delay was unreasonable).

In any event, a Rule 60(b) motion may be granted only in extraordinary circumstances. Rodriguez v. Mitchell, 252 F.3d at 201; Cashner v. Freedom Stores, Inc., 98 F.3d 572, 579 (10th Cir. 1996). Petitioner has not met that demanding standard. Indeed, petitioner's underlying claims lack merit.

Petitioner contends first that his stipulation that the deposits of the Boatmen's Bank were insured by the FDIC was "unacceptable and illegal" (Pet. 5) because parties to a federal

court action may not confer subject matter jurisdiction upon the court by stipulation. Pet. 5-8. But the district court's jurisdiction existed because the government filed an indictment alleging a federal offense, see 18 U.S.C. 3231, not because of proof of the FDIC insurance element. A failure of the indictment to allege, or the government to prove, an element of the offense, such as the FDIC insurance requirement, would not deprive the district court of subject matter jurisdiction. See United States v. Cotton, 122 S. Ct. 1781, 1785 (2002). As the court explained in United States v. Martin, 147 F.3d 529, 531-532 (7th Cir. 1998):

> Martin's argument [that the government did not prove a nexus to commerce] rests on the concept that a guilty plea does not waive jurisdictional defenses to the crime at issue. But the nexus with interstate commerce, which courts frequently call the "jurisdictional element," is simply one of the essential elements of [18 U.S.C.] § 844(i). Although courts frequently call it the "jurisdictional element" of the statute, it is "jurisdictional" only in the shorthand sense that without that nexus, there can be no federal crime under the bombing statute. It is not jurisdictional in the sense that if affects a court's subject matter jurisdiction, i.e., a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231. * * * Even if the government fails to establish the connection to interstate commerce, the district court is not deprived of jurisdiction to hear the case.

Ibid. (citations omitted); accord United States v. Ryan, 41 F.3d 361, 363-364 (8th Cir. 1994) (en banc) ("The interstate commerce aspect of this case arises merely as an element of the section 844(i) offense. If that element is not satisfied, then Ryan is not

guilty; but the court is not by the failure of proof of that element deprived of judicial jurisdiction."), cert. denied, 514 U.S. 1082 (1995). The same is true with respect to proof of FDIC insurance. A stipulation on the existence of such insurance, which is common in federal prosecutions, see United States v. Sliker, 751 F.2d 477, 484 n.3 (9th Cir. 1984), cert denied, 470 U.S. 1058 (1985), and 471 U.S. 1138 (1985), establishes an element of the offense; it is not relevant to establishing the district court's jurisdiction. Accordingly, the rule that parties may not stipulate to jurisdiction has no application here.

Second, petitioner contends (Pet. 10-12) that the district court erred in instructing the jury that, given the parties' stipulation that "at the time of the three bank robberies, Boatmen's Bank was insured by the [FDIC]," "[y]ou should therefore treat this as having been proved." Pet. App. H. Petitioner argues that the instruction interfered with his Sixth Amendment right to have the jury decide each element of the offense. Pet. 10.

Because petitioner did not raise that claim at trial or on direct appeal, he could not raise it on collateral attack without establishing both cause for his default and actual prejudice. See United States v. Frady, 456 U.S. 152, 167-168 (1982). Petitioner's Rule 60(b) motion is tantamount to a collateral challenge, and should be subject to the cause-and-prejudice rule. He can show neither here.

In fact, the transcript of the charge conference clearly demonstrates that defense counsel consented to that instruction. See Pet. App. E ("Judge, a copy of that instruction has been provided to the defendant and we do not object."). Because counsel expressly agreed to the instruction, defendant has waived any claim that it was error. United States v. Jackson, 124 F.3d 607, 617-618 (4th Cir. 1997) (defendant waived any error when he knowingly failed to object to jury instruction explaining the effect of a stipulation), cert. denied, 522 U.S. 1066 (1998); but see United States v. Barrow, 118 F.3d 482, 490-491 (6th Cir. 1997) (declining to apply invited error doctrine to stipulated jury instruction).

Nor can petitioner show prejudice. Since petitioner stipulated that the Boatmen's Bank was FDIC insured, and the record contained no evidence to the contrary, petitioner cannot possibly show that the allegedly "erroneous" instruction affected the outcome of his trial. United States v. Jones, 108 F.3d 668, 671 (6th Cir. 1997) (en banc); Barrow, 118 F.3d at 492-493; United States v. Cornish, 103 F.3d 302, 306 (3d Cir.), cert. denied, 520 U.S. 1219 (1997); see United States v. Gonzalez, 110 F.3d 936, 947 (2d Cir. 1997) ("Because defendants do not even argue, let alone establish, that the outcome in their case would have differed had the judge properly instructed the jury on the legal effect of the stipulations, it is plain to us that their substantial rights were unaffected.").

The same result would follow even if petitioner's claim were reviewed under the less-demanding plain-error standard for claims, like his, that were not raised at trial. Fed. R. Crim. P. 52(b). Under the fourth prong of the plain error test, a court should not exercise its discretion to correct a plain error unless that error seriously affects the fairness, integrity or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725, 732 (1993). Where the defendant voluntarily stipulates to true facts, it does not result in a miscarriage of justice to instruct the jury that these facts should be treated as proven. Barrow, 118 F.3d at 493; Jones, 108 F.3d at 672; Cornish, 103 F.3d at 306; see Johnson v. United States, 520 U.S. 461, 469 (1997) (failure to present element of materiality to jury did not seriously affect the fairness, integrity, or public reputation of judicial proceedings where evidence of materiality was overwhelming and element was essentially undisputed at trial).[2]

b. Rather than treat petitioner's motion as a failed or untimely Rule 60(b) motion, the courts below construed it as a

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[2] The same analysis applies to petitioner's apparent claim that, after instructing the jury it "should" find that the bank was FDIC insured, the district court erred in omitting that element from its instruction on the bank robbery offense. Pet. 10-12, Pet. App. E, App. to Motion for Relief Pursuant to Rule 60(b)(4) (Jury Instruction 17). Assuming arguendo that any error occurred, that error did not prejudice petitioner and will not result in a miscarriage of justice. Gonzalez, 110 F.3d at 944-947 (even assuming that failure to charge on stipulated element was error, claim does not survive plain error review).

second or successive Section 2255 petition. This Court has recognized that a party may not evade the limitations on second or successive petitions under 28 U.S.C. 2244(b) by simply characterizing such a motion as something else. See Calderon v. Thompson, 523 U.S. 538, 552 (1998). Thus, if a movant files a Rule 60(b) motion that attacks the validity of his underlying criminal conviction or sentence after filing an earlier petition or motion under Section 2254 or 2255, a court may regard the Rule 60(b) motion as second or successive under Section 2254 or 2255. See, e.g., Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir.) (en banc), cert. denied, 524 U.S. 965 (1998); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.), cert. denied, 525 U.S. 1024 (1998); United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); Burris v. Parke, 130 F.3d 782, 783-784 (7th Cir.), cert. denied, 522 U.S. 990 (1997); Felker v. Turpin, 101 F.3d 657, 660-661 (11th Cir.), cert. denied, 519 U.S. 989 (1996); Mathenia v. Delo, 99 F.3d 1476, 1480 (8th Cir. 1996), cert. denied, 521 U.S. 1123 (1997); Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996).

Some courts have also held that a Rule 60(b) motion may be used to correct certain errors in the earlier habeas proceeding. See Rodriguez v. Mitchell, 252 F.3d at 198-199 (Rule 60(b) motion proper to challenge defense counsel's fraudulent representations to district court in habeas proceeding); Banks v. United States, 167

F.3d 1082, 1084 (7th Cir. 1999) (per curiam) (misconduct of defense counsel during habeas proceedings); United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000) (error in collateral attack proceeding). But here, petitioner's purported Rule 60(b) motion directly attacked the validity of his underlying convictions, and accordingly those decisions do not apply.[3]

2. This case need not be held pending this Court's decision in Abdur-Rahman v. Bell, No. 01-9094 (cert. granted, April 22, 2002). The petition for certiorari in Abdur-Rahman presented the question whether "every Rule 60(b) motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." This case does not present that issue because the court of appeals below did not announce a categorical rule. Also, the Rule 60(b) motion at issue in Abdur-Rahman, like the one at issue in the Second Circuit's Rodriguez case discussed above, purports to challenge errors in the collateral habeas proceedings, whereas the Rule 60(b) motion at issue here directly challenged petitioner's convictions. Even a favorable resolution of the issue for the habeas petitioner in Abdur-Rahman would, therefore, be unlikely to assist petitioner here. In any event, for the reasons explained above, even if

---

[3] Nor does the result below conflict with United States v. Miller, 197 F.3d 644 (3d. Cir. 1999), United States v. Kelly, 235 F.3d 1238 (10th Cir. 2000), or Adams v. United States, 155 F.3d 582 (2d Cir. 1998), which all concerned whether a motion brought under a rule other than Section 2255 should be recharacterized as a first motion under Section 2255.

petitioner's untimely Rule 60(b) motion had not been recharacterized as a second petition under Section 2255, it would fail on the merits. Thus, this Court's decision in Abdur-Rahman will not affect the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

OCTOBER 2002